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Supreme Court, U.S.
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No. ①

IN THE

Supreme Court of the United States

SONYA DENIECE RANKIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435, 68 U.S.L.W. 4576 (2000) and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 72 U.S.L.W. 4546 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant?

2. Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, *Blakely v. Washington*, and *Cunningham v. California*, – U.S. —, 127 S. Ct. 856; 166 L. Ed. 2d 856, 75 U.S.L.W. 4078 (2007), requires that all facts (other than prior convictions) necessary to imposing aggravated terms be found by the jury or admitted by the defendant. ?

3. Whether California's sentencing adopted after *Cunningham v. California*, which eliminated the presumption of the midterm and gave sentencing judges "discretion" to choose any of the three terms, while not changing anything else, including the sentencing factors, violates *Cunningham?*

LIST OF ALL PARTIES

Petitioner

SONYA DENIECE RANKIN.

Respondent

PEOPLE OF THE STATE OF CALIFORNIA.

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The California Supreme Court's order and California Court of Appeal's opinion are unpublished. They are attached as an appendix.

BASIS FOR JURISDICTION IN THE SUPREME COURT

1. Date of entry of order sought to be reviewed: January 3, 2008 (order denying petition for review).

2. Date of any order respecting rehearing: not applicable.

3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury...

Fourteenth Amendment. Section. 1. ..... No State shall ... deprive any person of life, liberty, or property, without due process of law...

State Statutes

California Penal Code section 18: Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years.

California Penal Code section 182(a)(1). If two or more persons conspire ... to commit any crime... they shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony.

California Penal Code section 186.11(a)(1): Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than one hundred thousand dollars ($100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified in paragraph (2) or (3). This enhancement shall be known as the aggravated white collar crime enhancement. The aggravated white collar crime enhancement shall only be imposed once in a single criminal proceeding. For purposes of this section, 'pattern of related felony conduct' means engaging in at least two felonies that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and

that are not isolated events. For purposes of this section, "two or more related felonies" means felonies committed against two or more separate victims, or against the same victim on two or more separate occasions.

California Penal Code section 186.11(a)(2): If the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than five hundred thousand dollars ($500,000), the additional term of punishment shall be two, three, or five years in the state prison.

California Penal Code section 484(a): Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.

California Penal Code section 487(a). Grand theft is theft committed ... when the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400)...

California Penal Code section 489(a): Grand theft is punishable .... by imprisonment ... in the state prison.

California Penal Code section 496(a): Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison....

California Penal Code section 654(a): An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

California Penal Code section 1170:

(a)(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified... In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the

family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

former California Penal Code section 1170:

(a)....(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified... In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council.....

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the

victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

California Penal Code section 12022.1.

(a) For the purposes of this section only:

(1) "Primary offense" means a felony offense for which a person has been released from custody on bail or on his or her own recognizance prior to the judgment becoming final, including the disposition of any appeal, or for which release on bail or his or her own recognizance has been revoked. In cases where the court has granted a stay of execution of a county jail commitment or state prison commitment, "primary offense" also means a felony offense for which a person is out of custody during the period of time between the pronouncement of judgment and the time the person

actually surrenders into custody or is otherwise returned to custody.

(2) "Secondary offense" means a felony offense alleged to have been committed while the person is released from custody for a primary offense.

(b) Any person arrested for a secondary offense which was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years in state prison which shall be served consecutive to any other term imposed by the court.

California Rules of Court

California Rules of Court 4.420. Selection of base term of imprisonment:

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation

outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

California Rules of Court 4.421: Circumstances in aggravation include factors relating to the crime and factors relating to the defendant.

(a) Factors relating to the crime....

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission....

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism;

(9) The crime involved an attempted or actual taking or damage of great monetary value;

(10) The crime involved a large quantity of contraband; and

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Factors relating to the defendant

Factors relating to the defendant include that:

(1) The defendant has engaged in violent conduct that indicates a serious danger to society;

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;

(3) The defendant has served a prior prison term;

(4) The defendant was on probation or parole when the

crime was committed; and

(5) The defendant's prior performance on probation or parole was unsatisfactory.

California Rules of Court 4.425. Criteria affecting concurrent or consecutive sentences:
Criteria affecting the decision to impose consecutive rather than concurrent sentences include...

(b) Other criteria and limitations: Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except:

(1) A fact used to impose the upper term;

(2) A fact used to otherwise enhance the defendant's prison sentence; and

(3) A fact that is an element of the crime may not be used to impose consecutive sentences.

STATEMENT OF THE CASE

1. Statement of the Case

Petitioner was charged with two counts of conspiracy (Counts 1 and 11), California Penal Code section 182(a)(1), one count of possession of stolen property (Count 10), California Penal Code section 496, eleven counts of grand theft, (Counts 2-9 and 12-14), California Penal Code section 487(a), and four

enhancements, of which two were significant – aggravated white collar crime, California Penal Code section 186.11(a)(1) and (2)[1], and an offense committed while released on bail, California Penal Code section 12022.1. (CT 413-420.) Following a jury trial, petitioner was convicted.

On January 5, 2006, the superior court sentenced petitioner to 14 years, eight months based the following calculation:

base	Count 5, grand theft	3 year aggravated term
	Count 2, grand theft	8 months (⅓ midterm)
	Count 3, grand theft	8 months (⅓ midterm)
	Count 4, grand theft	8 months (⅓ midterm)
	Count 6, grand theft	8 months (⅓ midterm)
	Count 7, grand theft	8 months (⅓ midterm)
	Count 8, grand theft	8 months (⅓ midterm)

[1] The other two enhancements were essentially lesser versions of section 186.11(a)(1) and (2).

Count 10, possession of stolen property	8 months (⅓ midterm)
Count 12, grand theft	no additional time
Count 13, grand theft	8 months (⅓ midterm)
Count 14, grand theft	8 months (⅓ midterm)
Count 1, conspiracy	Stayed per California Penal Code section 654
Count 11, conspiracy	8 months (⅓ midterm)
enhancement section 12022.1	2 years
enhancement section 186.11(a)(1) & (2)	3 years
Total	14 years, 8 months

(Clerk's Transcript ("CT") 547-549.)

2. Statement of Facts

a. Main trial.

This case involved ongoing actions of petitioner and Willard

Rankins to cash counterfeit checks from various banks using agents to present the checks to the banks. Willard Rankins had previously been convicted in a separate trial.

Four individuals -- Claudia Bass (Reporter's Transcript ("RT.") 1076-1138), April McGlothen (RT. 1157-1176), Lakeisha Clark (RT. 1227-1229), and Kenya Ussery (RT. 2926-2952) testified that they and others had cashed or attempted to cash counterfeit checks for petitioner by presenting them at various banks.

Various witnesses from businesses whose checks had been counterfeited identified checks as counterfeit – checks identified were written to 37 different people.

A supplier of check paper testified that petitioner had ordered paper for printing checks. (RT. 3532-3555.)

A search of petitioner's home resulted in the seizure of four computers and some check exemplars. (RT. 1484-1486.) Analysis of the computers revealed software for creating and printing blank checks (RT. 3008-3010), records of 6,000 separate checks printed on one computer and about 1,600 on another (RT. 3010), and deleted images of checks. (RT. 3031.)

Petitioner's fingerprints were found on some of the recovered counterfeit checks. (RT. 2824.)

A fraud investigator for Washington Mutual Bank testified that many deposits and withdrawals of more than $1,000 had been made into and from an account under the name of "Pamela Lee", an alias of petitioner's, and that several

counterfeit checks had also been deposited into that account. (RT. 3757 - 3762).

Petitioner did not testify in the case in chief. However, prison authorities intercepted a letter from petitioner to her husband and co-conspirator Willard Rankins that arguably asked him to testify falsely that he was completely responsible for the check-passing activities and that petitioner had little or nothing to do with the scheme. (CT 361-362.)

Willard Rankins was called as a defense witness but asserted his Fifth Amendment privilege against self-incrimination. (RT. 3890.) Three other witnesses testified that petitioner was self-employed in a day care business during the period of time at issue (RT. 3909, 3986 to 3988), that petitioner had not been seen using a computer or printing checks (RT. 3911), and that Willard Rankins typically told petitioner what to do and would hit her on occasion (RT. 3943, 3948.)

The jury convicted petitioner of all charges on August 25, 2001.

b. Second trial on sentencing factors

Following the conclusion of the defense case, but prior to closing argument, the court advised counsel that, in an attempt to comply with *Blakely v. Washington*, it intended to have a bifurcated trial to have the jury make findings on aggravating factors, should the jury convict the defendants. (RT. 4080-4081.)

After the jury returned its verdict, on August 25, 2005, the court announced that it was going to hold the bifurcated trial.

(RT. 4339, 4342.) Petitioner's counsel requested a continuance to prepare, which was denied. (RT. 4341.) The court submitted the following sentencing factors to the jury:

1. Petitioner induced others to participate in the commission of the crimes.

2. The manner in which the crimes were carried out indicates planning, sophistication, or professionalism.

3. The crimes involved an attempted or actual taking or damage of great monetary value.

4. The crimes involved a large quantity of contraband.

5. The crimes involved the abuse of a trusted position. (RT 4498.)

Defense counsel did not ask the court to instruct on any defenses to these factors, such as duress, and the court did not do so. Defense counsel then made an opening statement telling the jury that she was going to show that petitioner was a victim of abuse, a pawn, and not the mastermind of the crimes for which she was convicted, and that she had done what she had done upon "punishment of being hit, scared, and beaten." (RT. 4349.)

Defense counsel called petitioner to testify. Petitioner testified that before she married Rankins, she discovered that he didn't have a job, was a "pimp", used women for what they would do for him, and had about 10 women working for him. Rankins hit her and beat her on various occasions. (RT. 4362

and 4363.) Petitioner testified that she worked at several different companies from July 2001 to May 2004, while Rankins did not work. (RT. 4375.) She denied knowledge of checks found during the search of her house and denied having anything to do with the check passing scheme. (RT. 4383-4384.)

On cross-examination, petitioner admitted, that she had been convicted of welfare fraud and depositing a forged check into her bank account in 1999. (RT. 4470-4472.) She did not tell her probation officer that her former husband Tolliver, who was deceased at the time of the probation report, was involved in a forgery ring, (RT. 4473), and denied running the previous forgery ring. (RT. 4475.) She also admitted that she had applied for driver's licenses under four different names. (RT. 4475.) Concerning the letter to Rankins that prison officials had intercepted, petitioner alternatively testified that the handwriting wasn't hers, that someone had written it for her, and that someone had been writing to Rankins impersonating her. (RT. 4479 and 4480.)

In closing, defense counsel only addressed the issue of whether petitioner had personally exercised sophistication and planning. (RT. 4497.)

The jury found all 5 sentencing factors true, beyond a reasonable doubt.

c. Sentencing

At sentencing, the court relied on three additional sentencing factors that had not been submitted to the jury –

a. that petitioner had attempted to suborn perjury by writing the letter to her husband Rankins in jail,

b. that petitioner had been on probation at the time she committed the offense, and

c. that her past convictions had been of increasing seriousness.

The court recognized that these factors had not be submitted to the jury, but decided that the law did not require these factors (or apparently, any others) to be submitted to the jury. (RT. 4531.)

The court relied primarily on factors "a" and "b", two of the three factors not submitted to the jury, in imposing the aggravated term for Count 5. The court relied primarily on the "abuse of a position of trust" factor that had been submitted to the jury to impose consecutive sentences on counts 2, 3, 4, 6, 7, 8, 9, 10, 12, 13, and 14. (RT. 4531-4532.)

3. Direct appeal in State courts.

The California Court of Appeal affirmed petitioner's convictions and sentence. Petitioner's discretionary petition for review was denied by the California Supreme Court on January 3, 2008.

ARGUMENT

1. This Court has already granted certiorari on the issue of whether the imposition of consecutive sentences falls within the *Apprendi/Blakeley* rule.

In *Oregon v. Ice*, No. 07-901 (March 17, 2008), 2008 U.S. LEXIS 2387; 76 U.S.L.W. 3496, this Court granted certiorari from the Oregon Supreme Court's opinion in *State v. Ice*, 343 Ore. 248, 170 P.3d 1049 (2007) on the following question:

> "Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant."

In *State v. Ice*, the Oregon Supreme Court construed a sentencing scheme very similar to California's and held that imposition of consecutive sentences under that scheme were subject to the requirements of the Sixth Amendment that facts necessary to impose such sentences had to be found by a jury or admitted by the defendant. The Oregon Supreme Court stated the issue as follows:

> "In *United States v. Booker*, 543 U.S. 220, 236, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the Court explained its rationale for adopting the foregoing rule. First, it noted that, with the advent of determinate sentencing schemes, it had been forced to consider 'the significance

of facts selected by legislatures that * * * increased the range of sentences possible for the underlying crimes.' Under sentencing schemes that permitted trial judges to impose a sentence that exceeded the statutory maximum for an offense, based on finding certain sentencing factors, '[i]t became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance' of the evidence. Id. The Court then explained that it had issued its holdings in *Apprendi* and *Blakely* in response to this 'new sentencing practice.' Id. at 237. The Court reasoned:

> 'As it thus became clear that sentencing was no longer taking place in the tradition [of judicial discretion in sentencing] that Justice Breyer invokes [in his dissenting opinion], the Court was faced with the issue of preserving an ancient guarantee [to trial by jury] under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led [the Court] to the answer first considered in *Jones [v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311, 67 U.S.L.W. 4204 (1999)] and developed

> in *Apprendi* and subsequent cases culminating with this one.'
>
> *Id.* (emphasis added). We believe that the foregoing statement from *Booker* makes it inescapably clear that the rule in *Apprendi* and *Blakely* is not directed at the traditional discretion of judges to select a sentence within a range that the legislature has selected and the jury's verdict determines, but at sentencing schemes that permit or require judges to impose sentences that are longer than sentences that a jury's verdict alone would authorize. Obviously, in the context of that concern, it does not matter that a factual determination is of a type that traditionally has been made by judges in the exercise of their sentencing discretion. The concern is with facts that increase a defendant's sentence beyond the prescribed maximum for the crime that the jury determined [30] that the defendant committed. Under *Apprendi, Blakely*, and their progeny, those facts must themselves be decided by a jury."

State v. Ice, 343 Ore. at 264-265, 170 P.3d at 1057. Because this case presents the same issue as *State v. Ice*, cert. granted in *Oregon v. Ice*, this Court should also grant certiorari for petitioner on that issue.

2. There is a conflict between various state courts, including the California Supreme Court, on the issue of whether the Sixth Amendment applies to imposition of consecutive sentences.

As noted in *State v. Ice*, 170 P.3d at 1058-1059, several

other state courts, including the California Supreme Court, have held that the Sixth Amendment does not apply to the imposition of consecutive sentences. These include *State v. Cubias*, 155 Wn. 2d 549, 120 P.3d 929 (2005); *People v. Black*, 41 Cal 4th 799, 62 Cal. Rptr. 3d 569, 161 P.3d 1130 (2007) ("*Black II*"); *People v. Wagener*, 196 Ill. 2d 269, 752 N.E.2d 430, 256 Ill. Dec. 550, cert den sub nom, *Wagener v. Illinois*, 534 U.S. 1011, 122 S. Ct. 498, 151 L. Ed. 2d 408 (2001). Since California is one of the states that is in conflict with the holding in *State v. Ice*, this Court should grant certiorari to resolve the conflict.

3. California has attempted to avoid this Court's decision in *Cunningham v. California* regarding the imposition of aggravated terms by attempting to recast California's determinate sentencing law as "discretionary." This involves an important question of Federal law that this court should grant certiorari to resolve.

In *Cunningham v. California*, this Court held that California's method of imposing the aggravated term under its determinate sentencing law violated the Sixth Amendment, as construed by *Apprendi* and *Blakely*. California has attempted to avoid *Cunningham* in two ways:

a. "Recidivism factor" exception

a. In *Black II*, the California Supreme Court held that any facts concerning recidivism fell outside of *Cunningham*, stating that *Cunningham's* exception for prior convictions includes "not only the fact that a prior conviction occurred, but also

other related issues that may be determined by examining the records of the prior convictions." *Black II*, 41 Cal. 4th at p. 819. However, in *Cunningham*, this Court considered and rejected the claim that the exception for priors is broader than the mere fact of the prior conviction itself. In his dissent in *Cunningham*, Justice Kennedy wrote:

> "The Court could distinguish between sentencing enhancements based on the nature of the offense, where the *Apprendi* principle would apply, and sentencing enhancements based on the nature of the offender, where it would not. California attempted to make this initial distinction. Compare Cal. Rule of Court 4.421(a) (Criminal Cases) (West 2006) (listing aggravating [f]acts relating to the crime), with Rule 4.421(b) (listing aggravating [f]acts relating to the defendant). The Court should not foreclose its efforts."

Cunningham v. California, 127 S.Ct. 856, 872. The majority in Cunningham held, in response to Justice Kennedy's objection:

> "Justice KENNEDY urges a distinction between facts concerning the offense, where *Apprendi* would apply, and facts concerning the offender, where it would not. Post, at 872 (dissenting opinion). *Apprendi* itself, however, leaves no room for the bifurcated approach Justice KENNEDY proposes. See 530 U.S., at 490, 120 S.Ct. 2348 ("'[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'"

Cunningham v. California, 127 S.Ct. at 869, fn. 14, quoting *Apprendi*.

As four of the five "facts relating to the offender" California Rules of Court 4.421(b) are recidivism factors ("increasing seriousness" of prior convictions, prior prison terms, offense committed during a prior term of probation or parole, unsatisfactory performance under prior probation and parole terms), this Court clearly held that at least these particular recidivism factors did not fall within an exception to *Cunningham*.

b. Recasting sentencing scheme as "discretionary."

In 2007, the California Legislature amended California Penal Code section 1170, subdivisions (a)(3), and (b), to give the sentencing court discretion to award one of the three sentencing choices in the determinate sentencing range, with no presumption of the middle term. In *People v. Sandoval,* 41 Cal. 4th 825, 161 P.3d 1146; 62 Cal. Rptr. 3d 588 (2007), the California Supreme Court added a court created remedy for defendants sentenced before the Legislature amended section 1170 that was essentially the same as the Legislative amendment, that on remand, the sentencing court would resentence as a matter of discretion and could consider any fact that it relied on before.

The new sentencing scheme still violates Cunningham, since there is essentially no change except to eliminate the presumption of the midterm. As this Court pointed out in *Cunningham*:

> "California's DSL does not resemble the advisory system the *Booker* Court had in view. Under California's system, judges are not free to exercise their 'discretion to select a specific sentence within a defined range.' *[United States v.] Booker,* 543 U.S. [220], at 233, 125 S. Ct. 738, 160 L. Ed. 2d 621 [(2005)]. California's Legislature has adopted sentencing triads, three fixed sentences with no ranges between them. Cunningham's sentencing judge had no discretion to select a sentence within a range of 6 to 16 years. His instruction was to select 12 years, nothing less and nothing more, unless he found facts allowing the imposition of a sentence of 6 or 16 years."

Cunningham v. California, 127 S. Ct. at 875. Under California's revised determinate sentencing law, the sentencing court may still only choose between a mitigated term, mid-term, and aggravated term for any particular offense. The California Rules of Court still set forth the permissible bases for trial courts to impose aggravated terms and consecutive sentences, so the "reasons" sentencing courts will be considering are the same they considered before, those set forth in the California Rules of Court.

As this Court further held in *Cunningham,* the California Supreme Court could not avoid the Sixth Amendment by simply providing for review on a "reasonableness" basis, as it attempted to do in *People v. Black*, 35 Cal. 4th 1238, 29 Cal. Rptr. 3d 740, 113 P.3d 534 (2005) ("*Black I*"):

> "The *Black [I]* court attempted to rescue the DSL's judicial fact-finding authority by typing it simply a

> reasonableness constraint, equivalent to the constraint operative in the federal system post-*Booker*... Reasonableness, however, is not, as the *Black [I]* court would have it, the touchstone of Sixth Amendment analysis. The reasonableness requirement *Booker* anticipated for the federal system operates within the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints. Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment. It is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable. *Booker's* remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless."

Cunningham v. California, 127 S. Ct. at 875-876.

In essence, California has done what the U.S. Supreme Court said that it could not do – simply kept the existing sentencing system (minus any presumption of the midterm) and substituted reasonableness review for the requirements of the Sixth Amendment.)

4. As the sentencing court did not have authority under California law to convene an ad hoc jury on sentencing factors, it makes no difference that jurors may have found some of the factors the sentencing court relied on in imposing consecutive sentences.

The sentencing court did not cure the problem by submitting some of the aggravating factors to the jury. This court specifically recognized in *Cunningham* specifically recognized that California lacked any lawful procedure for determining aggravating factors and that the state would have to alter its system to either provide for jury determination of such factors or to permit judges genuinely "to exercise broad discretion."

> "As to the adjustment of California's sentencing system in light of our decision, "the ball . . . lies in [California's] court." *Booker*, 543 U.S., at 265, 125 S. Ct. 738, 160 L. Ed. 2d 621; cf. supra, at 15. We note that several States have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury -- either at trial or in a separate sentencing proceeding -- to find any fact necessary to the imposition of an elevated sentence. As earlier noted, California already employs juries in this manner to determine statutory sentencing enhancements.... Other States have chosen to permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal. *Booker*, 543 U.S., at 233, 125 S. Ct. 738, 160 L. Ed. 2d 621. California may follow

> the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court's decisions."

Cunningham v. California, 127 S. Ct. at 876.

In *People v. Sandoval*, the California Supreme Court agreed that a sentencing court, in an attempt to comply with *Blakely*, could not simply create its own sentencing procedure of submitting questions to a jury:

> "Although such a process would comply with the constitutional requirements of *Cunningham*, engrafting a jury trial onto the sentencing process established in the former DSL would significantly complicate and distort the sentencing scheme. Neither the DSL nor the Judicial Council's sentencing rules were drafted in contemplation of a jury trial on aggravating circumstances. It is unclear how prosecutors might determine which aggravating circumstances should be charged and tried to a jury, because no comprehensive list of aggravating circumstances exists."

People v. Sandoval, 41 Cal.4th at 848. Thus, that the trial court did attempt to create its own sentencing jury in this case would not make any difference, as its actions were unauthorized under California law.

CONCLUSION

For the above reasons, this honorable Court should grant certiorari in this case.

Dated: Oakland, California, Monday, March 24, 2008.

Robert Joseph. Beles

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SONYA DENIECE RANKIN

APPENDIX

Filed 10/26/07 P. v. Rankin CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SONYA DENIECE RANKIN, Defendant and Appellant.	A11263 (Alameda County Superior Court No. 149280A) MEMORANDUM OPINION

This case raises a sentencing issue arising from a large-scale conspiracy to cash counterfeit checks.

A jury convicted defendant Sonya Deniece Rankin of two

counts of conspiracy (Pen. Code, § 182, subd. (a)(1));[2] 10 counts of grand theft (§ 487, subd. (a)); and one count of possession of stolen property (§ 496). The jury found that the loss was over $150,000 within the meaning of section 12022.6, subdivisions (a)(2) and (b), and over $100,000 within the meaning of section 1203.045, subdivision (a). The jury further found that the crimes involved a pattern of fraudulent conduct and a taking of over $500,000 (§ 186.11, subds. (a)(1), (2)), and that defendant was out on bail when she committed four of the crimes (§ 12022.1).

Defendant was sentenced to the upper term on one count of grand theft, count 5, and to consecutive sentences of eight months on all but one of the remaining counts of grand theft and on the count of possession of stolen property. The trial court stayed the sentences on the conspiracy counts pursuant to section 654. With enhancements, defendant's total sentence is fourteen years eight months.

In imposing the upper term on count 5, the trial court relied on nine aggravating factors: five found by the jury and four found by the court. The jury found that (1) defendant induced others to participate in the crime or occupied a position of leadership or dominance; (2) the manner in which the crime was carried out indicated planning, sophistication, or professionalism; (3) the crime involved a substantial loss of money; (4) the crime involved a large quantity of contraband; and (5) the crime involved an abuse of trust. The court found that (6) defendant had suborned perjury; (7) defendant's prior convictions were of increasing seriousness; (8) defendant was

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[2] Subsequent statutory citations are to the Penal Code.

on probation at the time of the offense; and (9) defendant's prior performance on probation was poor.

The appellant's opening brief and the respondent's brief were filed before July 19, 2007, when the California Supreme Court decided *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). In her reply brief, defendant concedes that *Black II* rejects her two contentions on appeal, and that we are bound by *Black II*.

1. Defendant contends that her upper term was imposed in violation of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*) and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). But the upper term was justified by an aggravating factor based on recidivism, which falls outside the constitutional requirements of these two cases.

In *Black II*, the court held: "Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term. [Citation.] Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.' " (*Black II, supra,* 41 Cal.4th at p. 813.)

In other words, if there is a single aggravating circumstance which satisfies *Blakely*, "any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to [a] jury trial." (*Black II,*

supra, 41 Cal.4th at p. 812.)

The *Black II* court further held, consistent with existing authorities, that a defendant's criminal history—including the increasing seriousness of her prior convictions—qualifies under the recidivism exception to *Blakely*. (*Black II, supra*, 41 Cal.4th at pp. 818-820.)

Thus, the aggravating factor based on the increasing seriousness of defendant's prior convictions was properly found by the court and, under *Black II*, is sufficient to justify the upper term.

2. Defendant also contends that her consecutive sentences were imposed in violation of *Cunningham*. But *Black II* makes it clear that *Cunningham* does not apply to consecutive sentencing. (*Black II, supra*, 41 Cal.4th at pp. 820-823.)

Defendant's upper term and consecutive sentences are appropriate. Defendant's argument that *Sandoval* invalidates jury-determined aggravating circumstances is moot.

The judgment and sentence are affirmed.

_____

Marchiano, P.J.

We concur:

_____

Stein, J.

_____

Swager, J.

THE PEOPLE, Plaintiff and Respondent,

v.

SONYA DENIECE RANKIN, Defendant and Appellant.

S158642

SUPREME COURT OF CALIFORNIA

2008 Cal. LEXIS 80

January 3, 2008, Filed

PRIOR HISTORY:
First Appellate District, Div. 1, No. A112663.

JUDGES: GEORGE, Chief Justice.

OPINION

Petition for review denied.

Werdegar, J., was absent and did not participate.